STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT K. MARTINDALE,

Defendant-Appellant.

UNPUBLISHED
August 16, 1996

No. 179748
LC No. 93-005491

Before: Taylor, P.J., and Murphy and E.J. Grant,* JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions and sentences for third-degree criminal sexual conduct, MCL 750.520d(1)(b); MSA 28.788(4)(1)(b); and unlawfully driving away an automobile, MCL 750.413; MSA 28.645. Defendant was sentenced to 60 to 180 months' imprisonment for his third-degree criminal sexual conduct conviction, and 40 to 60 months' imprisonment for his unlawfully driving away an automobile conviction. The sentences were ordered to run concurrently. We affirm.

Defendant first argues that there was insufficient evidence presented to convict him of these crimes, and that the trial court erred denying his motion for a new trial on this basis. In reviewing a sufficiency of the evidence claim, we view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Morton*, 213 Mich App 331, 334; 539 NW2d 771 (1995). We review a trial court's decision to deny a motion for a new trial for an abuse of discretion.

The essential elements of third-degree criminal sexual conduct, as charged in the instant case, are (1) sexual penetration of the complainant, (2) achieved by force or coercion. MCL 750d(1)(b); MSA 28.788(4)(1)(b); *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). Defendant contends that the prosecution failed to provide sufficient evidence on the second element, the use of force or coercion, in order to sustain a conviction. For purposes of satisfying this element, this

* Circuit judge, sitting on the Court of Appeals by assignment.

Court has defined force or coercion as where "'the defendant either used physical force or did something to make [the complainant] reasonably afraid of present or future danger.'" *People v Kline*, 197 Mich App 165, 166; 494 NW2d 756 (1992) (quoting CJI2d 20.15).

In viewing the evidence elicited at trial in a light most favorable to the prosecution, we conclude that sufficient evidence was produced at trial to convict defendant of this crime. Specifically, we find that whether sufficient evidence was presented on the element of force or coercion was a credibility question. The victim testified that she and defendant struggled, defendant pushed her onto the bed, and forced her pants down, while defendant testified that he did not force the victim's pants down and that the sexual intercourse was consensual. Accordingly, where the jury found the victim's testimony to be more credible than defendant's testimony, we should not interfere with that finding on appeal. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992).

The essential elements of the crime of unlawfully driving away an automobile ("UDAA") are (1) possession of a vehicle, (2) driving the vehicle away, (3) that the act is done willfully, and (4) the possession and driving away must be done without authority or permission. *People v Hendricks*, 200 Mich App 68, 71; 503 NW2d 689 (1993), affirmed 446 Mich 435 (1994). Defendant contends that the prosecution failed to present sufficient evidence that defendant took the victim's car without permission. According to defendant, because the victim never specifically told him that he could *not* use her car, and because there was no conversation between the two regarding defendant's use of the vehicle, insufficient evidence was presented on this element.

In viewing the evidence elicited at trial in a light most favorable to the prosecution, we conclude that sufficient evidence was presented to convict defendant of this crime. Again, we note that whether the elements of this crime were proven beyond a reasonable doubt depended upon the credibility of the witnesses in the eyes of the jury. Therefore, we will not second guess the jury on appeal. *Wolfe, supra*, 514. In addition, we believe that if this Court were to accept defendant's argument, we would be embracing the absurd result that one may take the vehicle of another, without permission, as long as the owner has not specifically said one could not take it. We believe that to accept such a premise would render the UDAA statute a nullity. Having found sufficient evidence to convict defendant of these crimes, we conclude that the trial court did not abuse its discretion in denying defendant's motion for a new trial. *People v Herbert* 444 Mich 466, 447; 511 NW2d 654 (1993).

Defendant next argues that the trial court erred in refusing to reread trial testimony during jury deliberations. It is well established that when the jury requests that testimony be read back to it, both the reading and the extent of the reading are matters confided to the sound discretion of the trial court. *People v Howe*, 392 Mich 670, 675; 221 NW2d 350 (1974); MCR 6.414(H).

The jury originally requested transcripts of both the victim and defendant's testimony. The trial court informed the jury that transcripts were unavailable, but tape of the testimony could be played back if requested. The trial court then told the jury to continue deliberating and submit a note if they wanted testimony to be played back. After continuing to deliberate, the jury asked if tape of the victim's

testimony could be played back, and the trial court complied with this request. The following day, deliberations continued, and at 11:15 a.m., the jury submitted a note to the trial court in which it requested defendant's testimony to be played back. The record also indicates that at 11:30 a.m., the jury submitted another note to the trial court in which it indicated it had reached a verdict. The record is devoid of a denial of the jury's request to play defendant's testimony. Apparently the jury reached its verdict prior to the trial court's disposition of its request and without the need to hear defendant's testimony. We find no abuse of discretion.

Finally, defendant argues that he was denied the effective assistance of counsel. Defendant failed to preserve this issue for appellate review; therefore, we will consider defendant's arguments to the extent that the alleged errors are apparent on the record. *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985). The effective assistance of counsel is presumed and the defendant bears a heavy burden in proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). To establish ineffective assistance of counsel, a defendant must show that, 1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and 2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*, 687-688.

Defendant alleges several instances of ineffective assistance. First, defendant claims that his counsel failed to object to the prosecution's leading questions during the examination of the victim. However, defendant has failed to specify which portions of the examination he takes issue with. A review of the entire examination reveals no instance in which, if defense counsel had objected, there is a reasonable probability that the result of the proceedings would have been different. Next, defendant claims that counsel was ineffective by failing to present any argument to the trial court in support of his directed verdict motion on the CSC charge. In light of the evidence presented by the prosecution, there is not a reasonable probability that, had defense counsel argued in support of his motion, that the motion would have been granted. Defendant also alleges that defense counsel was ineffective by failing to introduce medical testimony to interpret and explain the contents of the hospital's medical report regarding the victim's injuries. We find such a decision to be trial strategy, and will not second guess trial counsel' s decision. *People v Burnett*, 163 Mich App 331, 338; 414 NW2d 378 (1978). Last, defendant claims that defense counsel should have objected to the trial court's denial of the jury's request to review defendant's testimony. However, as previously mentioned, the trial court did not deny the jury's request, the jury reached a verdict prior to giving the trial court an opportunity to rule on the request. Accordingly, there was no reason for defense counsel to object. Defendant was not denied effective assistance of counsel.

Affirmed.

/s/ Clifford W. Taylor
/s/ William B. Murphy
/s/ Edward J. Grant